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7 NATIVE SONGBIRD CARE AND  
CONSERVATION, et al.,  
8 Plaintiffs,  
9 v.  
10 RAY LAHOOD, et al.,  
11 Defendants.

Case No. 13-cv-02265-JST

**ORDER DENYING MOTION FOR  
PRELIMINARY INJUNCTION**

Re: ECF No. 17

12 **I. INTRODUCTION**

13 Plaintiffs Native Songbird Care & Conservation, Veronica Bowers, Madrone Audubon  
14 Society, Center for Biological Diversity, Marin Audubon Society, and Golden Gate Audubon  
15 Society (collectively, “Plaintiffs”) have moved for a preliminary injunction against the United  
16 States Department of Transportation (“USDOT”), USDOT Secretary Ray LaHood, the Federal  
17 Highway Administration (“FHWA”), and FHWA Administrator Victor Mendez (the “Federal  
18 Defendants”), and against the California Department of Transportation (“Caltrans”) and Caltrans  
19 Director Malcolm Dougherty (collectively, “Defendants”). Plaintiff’s Motion for a Preliminary  
20 Injunction and Supporting Memorandum (“Motion”), ECF No. 17. Plaintiffs seek to enjoin  
21 Defendants from using exclusionary netting at the U.S. 101 Petaluma River and Lakeville  
22 Overpass Bridges and from undertaking any other construction work at the U.S. 101 and Petaluma  
23 River until further order of this Court. *Id.* at 25:3-7.

24 This Court recognizes its important role in ensuring that federal and state agencies evaluate  
25 the potential harm to the environment from human development activities, and protect the  
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1 environment from unnecessary or unjustified damage. However, the standard for injunctive relief  
2 is high, and on the evidence before it, the Court can only conclude that the standard has not been  
3 met. Accordingly, as more fully set forth below, the Court will deny the requested injunction.

## 4 **II. BACKGROUND**

### 5 **A. Factual Background**

6 The Marin-Sonoma Narrows High Occupancy Vehicle Widening Project (“Project”) is a  
7 series of improvements to a 16-mile portion of U.S. Route 101 in Marin and Sonoma counties  
8 designed to decrease traffic congestion, improve mobility, and address physical and operational  
9 deficiencies. Record of Decision (“ROD”), ECF No. 17-7, at 1. The Project, jointly proposed by  
10 Defendants FHWA and Caltrans, consists of “constructing High Occupancy Vehicle (HOV) lanes,  
11 widening and realigning portions of the roadway, construction of new interchanges, upgrading  
12 drainage systems, and construction of new frontage roads and bikeways.” Marin-Sonoma  
13 Narrows (MSN) HOV Widening Project Final Environmental Impact Report / Final  
14 Environmental Impact Statement (“FEIS”), at 1-1. Part of the project includes Caltrans’  
15 replacement of the Petaluma River Bridge and the reconstruction of the Lakeville Overpass Bridge  
16 (collectively, the “Bridges”). FEIS, at 3.1-94-97; see also Declaration of Bob Finney (“Finney  
17 Decl.”), ECF No. 38, at ¶ 6-8. Construction at both bridges began in December 2012. Declaration  
18 of Christopher Blunk (“Blunk Decl.”), ECF No. 35, at ¶ 5.

19 To fulfill their obligations under the National Environmental Protection Act (“NEPA”), 42  
20 U.S.C.A. § 4321 *et seq.*, and the California Environmental Quality Act (“CEQA”),<sup>1</sup> Cal. Pub. Res.  
21 Code § 21000 *et seq.*, Caltrans and FHWA engaged in a public review process involving public  
22 scoping meetings and collection of comments between 2001 and 2007. ROD, at 1, 6-7. A Draft  
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27 <sup>1</sup> Since this lawsuit does not raise CEQA issues, the Court refers to the combined DEIS/DEIR and  
28 FEIS/FEIR simply as NEPA documents.

1 Environmental Impact Statement (“DEIS”) prepared pursuant to NEPA was released and  
2 distributed to the public on October 16, 2007, and was followed by a 60-day public comment  
3 period. Id. at 7.

4 The DEIS disclosed potential project impacts to nesting birds generally, as well as the use  
5 of exclusionary netting as a mitigation measure to keep birds from nesting on structures where  
6 they would be affected by construction. Marin-Sonoma Narrows (MSN) HOV Widening Project  
7 Draft Environmental Impact Report/Draft Environmental Impact Statement (“DEIS”), at 3.3-31.  
8 In the description of “nesting birds” in the affected environment, the DEIS (and FEIS) noted that  
9 “[c]liff swallow nests were observed beneath the Novato Creek Bridge structure and the San  
10 Antonio Creek Bridge structure along US 101.” DEIS, at 3.3-27; FEIS, at 3.3-31.<sup>2</sup> After  
11 receiving comments from members of the public including many of the Plaintiffs in this case,  
12 FHWA and Caltrans released the FEIS on August 7, 2009. The FEIS contained Caltrans’ response  
13 to Plaintiffs’ comments on nesting birds generally, saying that “Caltrans would conduct surveys  
14 for nesting birds prior to beginning construction on any of the culverts or bridge structures,” and  
15 that prior “to the nesting season, Caltrans would use exclusionary netting where possible to  
16 prevent birds from nesting in or on structures that would be impacted by the project.” FEIS, at  
17 3.5-58.

18 The DEIS and FEIS did not specifically identify a large colony (the “Colony”) of cliff  
19 swallows that have arrived each spring to nest at the Petaluma River and Lakeville Overpass  
20 bridges (the “Bridges”) for ten years or more. See Declaration of Lisa Hug (“Hug Decl.”), ECF  
21 No. 17-4, at ¶ 3-4, Declaration of Veronica Bowers, ECF No. 17-5, at ¶ 6. The FEIS also did not  
22 specifically identify the exclusionary netting as causing potential impacts to the birds (as opposed  
23 to being employed as mitigation for the impacts of the construction itself). Cliff swallows are

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28 <sup>2</sup> These bridges are not the Bridges at issue in this case.

1 categorized as a “species of least concern” by the International Union for Conservation of Nature,  
2 Fed. Defts. Exh. 2, ECF No. 31-2, but as a migratory bird that is native to the United States, they  
3 are listed by the U.S. Fish & Wildlife Service (“FWS”) as protected under the provisions of the  
4 federal Migratory Bird Treaty Act (“MBTA”), 16 U.S.C. § 703 *et seq.*; see also 50 C.F.R. §  
5 10.13(c)(1).

6 On November 23, 2009, FHWA published a notice in the Federal Register, advising the  
7 public of the issuance of a ROD approving the Project and announcing that any claim challenging  
8 the Project would be barred unless it was filed in federal court on or before May 24, 2010. 74 Fed.  
9 Reg. 61203. The ROD contained the agencies’ responses to some of Plaintiffs’ comments on the  
10 FEIS. ROD, at 14-16, 20-21.

12 In mid-February 2013, Caltrans contractor C.C. Meyers, Inc. installed exclusionary netting  
13 on portions of the Bridges. Blunk Decl., at ¶ 11; Finney Decl., at ¶ 10; Caltrans 6/3/13 Report,  
14 Fed. Defts.’ Exh. 3D, ECF No. 31-3, at 45. In March and April, when swallows returned from  
15 their migration, numerous cliff swallows became entangled in the netting and many died. Caltrans  
16 6/3/13 Report, at 43; Bowers Decl., at ¶ 14. Caltrans reports 65 cliff swallow deaths during those  
17 months; Plaintiffs suspect more may have died. Updated Declaration of Carie Montero (“Updated  
18 Montero Decl.”), ECF No. 49-1, at ¶ 5; Bowers Decl., at ¶ 14; Complaint, at ¶ 100. Although  
19 some Plaintiffs believe netting is dangerous no matter how it is installed, Plaintiffs and Defendants  
20 both believe deaths occurred because the netting was installed too loosely, so that birds were not  
21 fully excluded from construction locations at the Bridges but instead became trapped within the  
22 netting. Hug Decl., at ¶ 8; Blunk Decl., at ¶ 14. After consulting with the FWS and the California  
23 Department of Fish & Wildlife, (“CDFW”), Caltrans and its contractor made repairs and  
24 modifications to the netting and installed other bird deterrents. Blunk Decl., at ¶¶ 14-15, 20;  
25 Declaration of Carie Montero (“Montero Decl.”), ECF No. 33, at ¶ 13.

1 Since the end of April, Caltrans construction staff and biologists have monitored the  
2 Bridges daily and recorded no swallow mortalities in the netting. Montero Decl., at ¶¶ 15-21;  
3 Updated Montero Decl., at ¶ 3. Plaintiffs, who have regularly documented the activities at the  
4 Bridges, have also reported no swallow mortalities from netting during that time.

5 **B. Procedural History**

6 On May 17, 2013, Plaintiffs brought a complaint for declaratory and injunctive relief  
7 against the Federal Defendants, Caltrans Director Malcolm Dougherty, and Caltrans. Complaint  
8 for Declaratory and Injunctive Relief (“Complaint”), ECF No. 1. In it, Plaintiffs brought a claim  
9 under NEPA and the judicial review procedures of the Administrative Procedure Act (“APA”), 5  
10 U.S.C. § 701 *et seq.*, and a claim under the MBTA and the APA. Id., at ¶¶ 115-22. Plaintiffs seek  
11 a declaratory judgment that Defendants are violating the MBTA, NEPA and the APA, an order  
12 enjoining Defendants from engaging in operations and activities that cause a “take” of cliff  
13 swallows at the Bridges, an award of attorney fees and litigation costs, and such other further relief  
14 as the Court deems proper. Id., at p. 24.

15 Plaintiff filed this motion for a preliminary injunction on May 28, 2013. Pursuant to the  
16 parties’ stipulation, the Court agreed to hear argument on the Motion on an accelerated schedule.  
17 See ECF Nos. 46 & 47. The Federal Defendants and Director Dougherty each filed separate  
18 opposition briefs. Federal Defendants’ Opposition to Plaintiffs’ Motion for Preliminary  
19 Injunction, ECF No. 31; Defendant Dougherty’s Opposition to Plaintiffs’ Motion for Preliminary  
20 Injunction, ECF No. 32. Plaintiffs replied to both opposition briefs on June 20. Plaintiffs’ Reply  
21 in Support of their Motion for a Preliminary Injunction (“Reply”), ECF No. 48.

22 **C. Legal Standard**

23 A plaintiff seeking a preliminary injunction “must establish that he is likely to succeed on  
24 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the  
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balance of equities tips in his favor, and that an injunction is in the public interest.” Am. Trucking Associations, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting Winter v. Nat. Resources Defense Council, 555 U.S. 7, 20 (2008)). Injunctive relief is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” Winter, 555 U.S. at 22.

To grant preliminary injunctive relief, a court must find that “a certain threshold showing is made on each factor.” Leiva-Perez v. Holder, 640 F.3d 962, 966 (9th Cir. 2011). Provided that this has occurred, in balancing the four factors, “‘serious questions going to the merits’ and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

#### **D. Jurisdiction**

Since both of Plaintiffs’ causes of action arise under federal statutes, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

### **III. ANALYSIS**

#### **A. Likelihood of Success on the Merits**

##### **1. MBTA**

The MBTA provides “it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture [or] kill . . . any migratory bird” unless permitted by the Interior Secretary. 16 U.S.C. §§ 703-704.<sup>3</sup> The text of the statute indicates that it is a criminal statute enforced by the FWS. See 16 U.S.C. §§ 706, 707(a), (d). It creates no private right of action.

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<sup>3</sup> Unlike similar language in the Endangered Species Act, this does not include indirect harms through habitat modification. Seattle Audubon Soc’y v. Evans, 952 F.2d 297, 303 (9th Cir. 1991).

1 However, Plaintiffs bring a cause of action under the APA for violations of the MBTA, arguing  
2 that, by applying netting that killed migratory birds and may continue to do so in the future  
3 without a permit from the FWS, Federal Defendants are acting “not in accordance with law,” and  
4 therefore are liable under § 706(2)(a) of the APA. Complaint, at ¶ 122; Motion, at 18:5-19:20.

5 Plaintiffs can only bring a claim under § 706(2) of the APA to challenge a “final agency  
6 action.” 5 U.S.C. § 704. The “final agency action” Plaintiffs challenge is the ROD approving the  
7 Project. Motion, at 18:5; Reply, at 12:14-18. That claim is barred by the statute of limitations,  
8 since it was not brought within 180 days of the date of the ROD. 23 U.S.C. § 139(l)(1).<sup>4</sup> The  
9 FEIS explicitly disclosed the exclusionary netting would be used in construction, and no suit was  
10 brought during the limitations period alleging that such an act would take migratory birds. The  
11 ROD did not authorize any take of migratory birds, and the FEIS did not predict any.

12 Although they do not argue that it qualifies as a “final agency action,” Plaintiffs suggest  
13 that the application of the netting itself might be challengeable under § 706(2). First, construction  
14 implementation does not fall within the definition of “final agency action”: an “agency rule, order,  
15 license, sanction, relief, or the equivalent.” 5 U.S.C. § 551(13). Second, the Federal Defendants  
16 have issued funding for the Project, but they did not apply the netting; Caltrans’ contractor did.  
17 Third, such an interpretation would come very close to nullifying the effect of the statute of  
18 limitations, which as “a condition to the waiver of sovereign immunity . . . must be strictly  
19 construed.” Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 94 (1990).

20 Plaintiffs’ counsel at oral argument clarified that it is Plaintiffs’ view that the APA and  
21 MBTA authorize private suits against federal agencies whenever an agency authorizes a project  
22 implemented by third parties that, years later, has the unintended effect of taking even a single  
23 migratory bird. Private suits under the MBTA appear to be rare, and the cases cited by Plaintiffs

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28 <sup>4</sup> The statute has been subsequently amended and the limitations period is now 150 days.

1 do not support such an expansive interpretation of its scope. See Humane Soc'y v. Glickman, 217  
2 F.3d 882, 884 (D.C. Cir. 2000) (federal agency proposed to directly undertake action that would  
3 intentionally kill and capture Canada geese); Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d  
4 161, 167 (D.D.C. 2002) (U.S. Navy directly proposed live fire training exercises that it  
5 acknowledged would take migratory birds), vacated sub nom. as moot by Ctr. for Biological  
6 Diversity v. England, Case No. 02-5163, 2003 WL 179848, at \*1 (D.C. Cir. Jan. 23, 2003); United  
7 States v. Corbin Farm Serv., 444 F. Supp. 510, 536 (E.D. Cal. 1978), aff'd on other grounds, 578  
8 F.2d 259 (9th Cir. 1978) (criminal prosecution against defendant alleged to have poisoned birds).  
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10 Plaintiffs' claims against Defendant Dougherty are also unlikely to succeed for similar  
11 reasons. In addition, while Caltrans is more directly responsible for applying the netting, the APA  
12 only authorizes suits against federal agencies. See 5 U.S.C. § 701(b)(1).

13 The MBTA's protections of migratory birds remain in force, subject to the enforcement  
14 authority of the FWS. But in this situation, there are no serious questions going to the merits of  
15 Plaintiffs' private civil action under the APA for violations of the MBTA.  
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## 17 2. NEPA

18 Plaintiffs argue that they have demonstrated a substantial likelihood of success on the  
19 merits of their NEPA claim because Defendants failed to take the requisite "hard look" at  
20 environmental impacts on the Colony in the FEIS, and because Defendants have violated the APA  
21 by failing to prepare or consider preparing a Supplemental EIS in light of new information.  
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### 23 a. Adequacy of the FEIS

24 On this point, the parties are largely arguing past each other. Both parties acknowledge  
25 that the limitations period to challenge the FEIS has passed. See 23 U.S.C. § 139(l)(1). But both  
26 parties also concede that, pursuant to 23 U.S.C. § 139(l)(2), the "Secretary shall consider new  
27 information received after the close of a comment period if the information satisfies the  
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1 requirements for a supplemental environmental impact statement under [23 C.F.R. § 771.130].”  
2 Plaintiffs characterize this section as “a *de facto* exception to the statute of limitations.” See  
3 Reply, at 7:18-8:8 (quoting Yorkshire Towers Co., L.P. v. U.S. Dep't of Transp., Case No. 11-  
4 CIV-1058-TPG, 2011 WL 6003959, at \*4 (S.D.N.Y. Dec. 1, 2011), appeal withdrawn (Apr. 30,  
5 2012).<sup>5</sup> Defendants characterize this section as establishing a separate and distinct standard for  
6 preparing a Supplemental EIS. Both parties agree that Plaintiffs are not barred from bringing a  
7 claim under the APA that Defendants have acted in violation of 23 U.S.C. § 139(l)(2) and 23  
8 C.F.R. § 771.130.

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10 However, to the extent that Plaintiffs argue that, independent of the requirements to  
11 prepare a Supplemental EIS, they also have the ability, years after the limitations period expired,  
12 to challenge the FEIS itself, see Reply, at 11:1-12:15, they have not demonstrated any serious  
13 question going to the merits of that claim.

14 The only two cases Plaintiffs cite to support the concept of “equitably tolling” the deadline  
15 to challenge an EIS are inapposite. Wind River Mining Corp. v. United States, 946 F.2d 710, 715  
16 (9th Cir. 1991) was not a NEPA case. In Sierra Club North Star Chapter v. Peters, Civil No. 07-  
17 2593 (MJD/SRN), 2008 WL 2152199, at \*10 (D. Minn. May 15, 2008), the court tolled the  
18 deadline by a day because the agency posted a “misleading Federal Register notice” that mis-  
19 stated the deadline to file challenges. The North Star court understandably “[could] not conceive  
20 of how a one-day delay could cause prejudice” to the agency in that situation. Id. Here, Plaintiffs  
21 seek a tolling period of three years without any allegation that Defendants committed any  
22 procedural error in posting notice of the deadline to challenge the action. Neither of these cases,  
23 even if they were binding precedent applicable to this case, stand for the proposition that a project  
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26 <sup>5</sup> The Yorkshire Towers court used that phrase, but explicitly held that the deadline to challenge  
27 the previous FEIS should not be tolled and that plaintiffs’ only recourse was through 23 C.F.R. §  
28 771.130. 2011 WL 6003959, at \*5-7. (It also denied that claim. Id., at \*7.)

1 opponent may continue to litigate the substantive adequacy of an EIS years after the limitations  
2 period has expired. As discussed *supra*, this could hardly be considered a “strict[] constru[ction]”  
3 of the statute of limitations. Irwin, 498 U.S. at 94.

4 **b. Failure to Consider Preparing a Supplemental EIS**

5 Plaintiffs’ final cause of action under the APA and NEPA is that new information has  
6 come to light that requires Defendants to prepare a Supplemental EIS, or at least make a  
7 reviewable determination whether one is required. Defendants’ counsel argues that the standard  
8 requiring a Supplemental EIS has not been met, but the agencies themselves have yet to make any  
9 formal determination on the record of whether a Supplemental EIS is necessary.

10 “[A]n agency that has prepared an EIS cannot simply rest on the original document.”  
11 Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557 (9th Cir. 2000). “The agency must be  
12 alert to new information that may alter the results of its original environmental analysis.” Id.  
13 If the new information is sufficient to show that the remaining action will “‘affec[t] the quality of  
14 the human environment’ in a significant manner or to a significant extent not already considered, a  
15 supplemental EIS must be prepared.” Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374  
16 (1989) (citing 42 U.S.C. § 4332(c)).

17 Pursuant to the FHWA’s environmental review regulations, “an EIS shall be supplemented  
18 whenever the Administration determines that: (1) Changes to the proposed action would result in  
19 significant environmental impacts that were not evaluated in the EIS; or (2) New information or  
20 circumstances relevant to environmental concerns and bearing on the proposed action or its  
21 impacts would result in significant environmental impacts not evaluated in the EIS.” 23 C.F.R. §  
22 771.130(a).

23 The APA contains two separate provisions for judicial review of federal agency action.  
24 The more familiar avenue is through § 706(2), which permits, *inter alia*, a reviewing court to set  
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1 aside an agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in  
2 accordance with law.” § 706(2)(a). Section 706(2) only applies to a “final agency action[s],” and  
3 therefore it generally occurs when an agency has made some final written reviewable  
4 determination, presumably after utilizing its pertinent expertise. Courts, including the Ninth  
5 Circuit, “have upheld agency use of SIRs [Supplemental Information Reports] and similar  
6 procedures for the purpose of determining whether new information or changed circumstances  
7 require the preparation of a supplemental EA or EIS.” Idaho Sporting Cong. Inc. v. Alexander,  
8 222 F.3d 562, 566 (9th Cir. 2000).

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10 On the other hand, “when a court is asked to review agency inaction before the agency has  
11 made a final decision, there is often no official statement of the agency’s justification for its  
12 actions or inactions.” San Francisco BayKeeper v. Whitman, 297 F.3d 877, 886 (9th Cir. 2002).  
13 In such cases, review is available through Section 706(1), through which a reviewing court may  
14 “compel agency action unlawfully withheld or unreasonably delayed.”

15 Hedging their bets, Plaintiffs invoke both sections 706(1) and 706(2). The hedge is a  
16 prudent one. Review of an agency’s determination that a EIS “need not be supplemented . . . is  
17 controlled by the ‘arbitrary and capricious’ standard of § 706(2)(a).” Marsh, 490 U.S. at 376.  
18 However, “an action to compel an agency to prepare an SEIS . . . is not a challenge to a final  
19 agency decision, but rather an action arising under 5 U.S.C. § 706(1).” Dombeck, 222 F.3d at  
20 560.  
21

22 When the agency has prepared a written determination that a court can review, the  
23 distinction between the two subsections makes little difference. Either the determination itself is a  
24 final agency action reviewable pursuant to 706(2)(a), or else the court reviews the SIR to  
25 determine whether the agency has “unlawfully withheld” the preparation of a Supplemental EIS  
26 pursuant to 706(1). In either case, the standard is the same: “[w]hen new information comes to  
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1 light the agency must consider it, evaluate it, and make a reasoned determination whether it is of  
2 such significance as to require" a Supplemental EIS. N. Idaho Cmty. Action Network v. U.S.  
3 Dep't of Transp., 545 F.3d 1147, 1155 (9th Cir. 2008) (quoting Dombeck, 222 F.3d 552, 558 (9th  
4 Cir. 2000) (quoting Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1024 (9th Cir.  
5 1980)). The court's inquiry must be "searching and careful," but "narrow," and the "agency must  
6 have discretion to rely on the reasonable opinions of its own qualified experts even if, as an  
7 original matter, a court might find contrary views more persuasive." Marsh, 490 U.S. at 378.  
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9 But the situation is more difficult when, as here, the agency has yet to issue a SIR or any  
10 other written evaluation of the new information. There has been no "final agency action." So the  
11 court must determine whether the agency has "unreasonably delayed or unlawfully withheld" its  
12 determination, or whether the lack of a SIR demonstrates that the agency has "unreasonably  
13 delayed or unlawfully withheld" the Supplemental EIS. In doing so, the court cannot defer to  
14 agency expertise because the agency has yet to utilize it. While Defendants' counsel argue that  
15 the standard requiring preparation of Supplemental EIS has not been met, it "is a fundamental  
16 principle of administrative law that "courts may not accept . . . counsel's *post hoc* rationalizations  
17 for agency action." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,  
18 463 U.S. 29, 50 (1983); see also Dombeck, 222 F.3d at 558 ("although the Forest Service now can  
19 point to data that, if timely considered, would have shown that the new information did not require  
20 an SEIS, this does not demonstrate that the *Forest Service* complied with NEPA, which demands  
21 timely and reasoned *agency action*") (emphases added).  
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23 Plaintiffs appear to suggest that in this situation, if *any* new information of *any* kind has  
24 come to light, agencies are in *per se* violation of the APA until they issue a SIR or other expert  
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1 determination evaluating the new information. Motion, at 14:12-14; Reply, at 8:24-9:2.<sup>6</sup> This  
 2 cannot be the rule. To require an agency to “supplement an EIS every time new information  
 3 comes to light after the EIS is finalized . . . would render agency decisionmaking intractable,  
 4 always awaiting updated information only to find the new information outdated by the time a  
 5 decision is made.” Marsh, 490 U.S. 360 at 373. The same is true, though to a lesser extent, if an  
 6 agency were required to prepare a SIR explaining why it would *not* perform a Supplemental EIS  
 7 every time even the slightest new information came to the light over the course of a multi-year  
 8 project. Allowing such an approach would potentially stymie the completion of virtually any  
 9 project by periodically sending the agency back to the drawing board to analyze every piece of  
 10 new information it had not yet explicitly discussed.

12 Unless a SIR is required for literally every piece of new information, no matter how  
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14 <sup>6</sup> The published authority on this issue generally demonstrates that in considering an agency’s  
 15 failure to prepare a Supplemental EIS, courts review a written determination or at least an expert  
 16 determination. See Presidio Golf Club v. Nat’l Park Serv., 155 F.3d 1153, 1162-63 (1998) (Park  
 17 Service prepared EA); Marsh, 490 U.S. at 379 (the Army Corps “responded to the claim that these  
 18 documents demonstrate the need for supplementation of the FEISS by preparing a formal  
 19 Supplemental Information Report”); Price Road Neighborhood Ass’n, Inc. v. U.S. Dep’t of Trans.,  
 20 113 F.3d 1505, 1509 (9th Cir. 1997) (FHWA conducted a written reevaluation pursuant to 23  
 21 C.F.R. § 771.129(c)); Environmental Protection Information Center v. U.S. Forest Serv., 451 F.3d  
 22 1005, 1011 (9th Cir. 2006) (FWS prepared an EA and a biological opinion); N. Idaho Cmty.  
 23 Action Network v. U.S. Dep’t of Transp., 545 F.3d 1147, 1157 (9th Cir. 2008), (“the agencies  
 24 prepared both an EA and a reevaluation”); Headwaters, Inc. v. Bureau of Land Mgmt., Medford  
 25 Dist., 914 F.2d 1174, 1180 (9th Cir. 1990) (the BLM prepared an EA, and in considering  
 26 information provided after the EA, “BLM credited the conclusions of its own experts in deciding  
 27 that the additional information was not significant”). But in all likelihood, this uniformity is  
 28 explained by the timeline for appellate review. In an appeal that produces a published decision, an  
 agency would have time to attempt to moot the issue by producing a SIR or other document after  
 the litigation began. See, e.g., Dombeck, 222 F.3d at 561 (“among the documents prepared since  
 the inception of this litigation are a new SIR, several Biological Assessments and Biological  
 Evaluations, and other documents, all of which contain additional data and analyses”). Dombeck  
 comes closest to suggesting that evaluation is always required of all new information, but even  
 that case the court emphasized that the agency had been confronted with “important information”  
 and recognized that what NEPA requires is “timely and reasoned agency action.” Id. at 559. The  
 question of whether a written determination is required for all new information is a question  
 capable of repetition at the district court level, yet evading appellate review.

1 recently received or how relevant to the project, the agency does not “unlawfully withhold” its  
2 determination if it has not yet had time to prepare it or if the information fails to meet a minimal  
3 threshold relevance level. Nor can failure to prepare a SIR in such circumstances constitute the  
4 “unreasonabl[e] delay[] or unlawful[] withh[olding]” of a Supplemental EIS.

5 But on the other hand, neither can courts abdicate their responsibility to ensure that the  
6 important environmental goals of NEPA are effectuated. Commentators note that one of the  
7 primary functions of judicial review of agency action is an “expertise-forcing” analysis. Jody  
8 Freeman & Adrian Vermeule, Massachusetts v. EPA: From Politics to Expertise, 2007 Sup. Ct.  
9 Rev. 51, 52 (2007). This function is particularly important when an agency “decides not to  
10 decide,” potentially circumventing Congress’ statutory command. See id. at 85-87.<sup>7</sup> It would  
11 circumvent one of NEPA’s main goals to permit agencies to avoid “tak[ing] a hard look at the  
12 proffered evidence” of continuing environmental effects. Marsh, 490 U.S. at 385. If an agency  
13 has had time to respond to new information, and declines to make any expert determination, it  
14 foregoes any claim of deference and must submit to a court’s *de novo* determination of whether a  
15 Supplemental EIS is required.

16 Courts are well positioned to determine legal aspects of this question *de novo* (for example,  
17 whether certain information is “new,” and whether there has been a “change in the proposed  
18 action”). But various other aspects of the decision -- for example, estimating the likelihood that  
19 netting will significantly impact cliff swallows -- are “a classic example of a factual dispute the  
20 resolution of which implicates substantial agency expertise.” Marsh, 490 U.S. at 376. Courts are  
21 not very well situated to make such determinations. But where there is no expert determination on  
22 the record, courts must make them the best they can, while being mindful of NEPA’s expressed  
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27 <sup>7</sup> As Freeman & Vermeule put it, quoting a *New Yorker* cartoon, the agency cannot respond to  
28 citizens’ requests for a determination by saying “How about never? Does never work for you?”

1 purpose of promoting environmental disclosure.

2       Turning to the facts of this case, Plaintiff's motion states that the swallows' "arrival and  
3 subsequent capture, death and dispersal this nesting season" is new information that "would result  
4 in significant environmental impacts not evaluated in the EIS." Motion, at 13:18-20; 23 C.F.R. §  
5 771.130(a). Defining significance for NEPA purposes "requires considerations of both context  
6 and intensity," and in determining "intensity," agencies consult ten listed criteria. 40 C.F.R. §  
7 1508.27. Plaintiffs state that four of these factors -- "unique characteristics of the geographic  
8 area," the "degree to which the effects on the quality of the human environment are likely to be  
9 highly controversial," the "degree to which the action may establish a precedent for future  
10 actions," and "whether the action threatens a violation of Federal, State, or local law or  
11 requirements imposed for the protection of the environment" -- weigh in favor of a significance  
12 finding.

13       Some of these factors may weigh in that direction to a limited degree. But Plaintiffs have  
14 not demonstrated that the overall consideration of all relevant factors is likely to rise to the level  
15 considered "significant." For example, in considering "context," Plaintiffs have not demonstrated  
16 that the death of 65 swallows, as impactful as it was to many people, rises to a level considered  
17 significant at various levels "such as society as a whole (human, national), the affected region, the  
18 affected interests, and the locality." 40 C.F.R. § 1508.27(a). Other considerations in the "impact"  
19 level weigh against a significance finding, for example, "[t]he degree to which the action may  
20 adversely affect an endangered or threatened species or its habitat." 40 C.F.R. § 1508.27(b)(9).

21       More importantly, the question is not whether the deaths that occurred in March and April  
22 are themselves significant impacts. The capture and death of swallows in 2013 are, by definition,  
23 facts not considered in the original EIS. The relevant consideration is whether the possibility of  
24 such events was not known to the agency at the time and whether it might have changed the  
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26       such events was not known to the agency at the time and whether it might have changed the  
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1 agency's impact conclusion if it had been. Plaintiffs have not demonstrated that the possibility  
2 that netting could, if installed poorly, kill swallows, would change the agencies' conclusion that  
3 the construction would not significantly impact nesting birds if appropriate mitigation were  
4 employed.

5 In their Reply and at oral argument, Plaintiffs also invoked Plaintiffs' expert reports that  
6 the Project may be having a negative effect on the Colony by dispersing swallows from favored  
7 nesting sites or by subjecting them to construction impacts. It is not clear from the record how  
8 long the agencies have had this information and whether they have had a reasonable opportunity to  
9 review it and determine whether it is significant.<sup>8</sup> In any case, Plaintiffs have not demonstrated  
10 that this information would necessarily change the EIS' conclusion that construction activities  
11 would have a less-than-significant effect on nesting birds if appropriately mitigated.

12 It is true that the FEIS did not disclose the Colony's springtime and summer presence at  
13 the Bridges, and it is also true that a Caltrans spokesman reportedly stated to the press that the  
14 swallows' arrival in large numbers was unanticipated. Peter Fimrite, Swallows may delay  
15 Petaluma bridge work, Apr. 29, 2013, *San Francisco Chronicle*, ECF No. 17-4. This does raise  
16 questions about whether the Colony's presence was known to Defendants at the time that they  
17 prepared the FEIS.<sup>9</sup>

18 The Court has undertaken its own review of cases involving the discovery of new  
19 information, and was unable to find a case requiring an agency to evaluate new information of the  
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8 The Court does not mean to suggest that Plaintiffs must necessarily provide this information to  
Defendants to demonstrate that Defendants must consider preparing a Supplemental EIS. "It is the  
agency, not an environmental plaintiff, that has a 'continuing duty to gather and evaluate new  
information relevant to the environmental impact of its actions,' even after release of an EIS."  
Dombeck, 222 F.3d at 449 (quoting Warm Springs, 621 F.2d at 1023). But knowing when and  
whether the information came to light is relevant to the Court's determination of whether the  
agency has "unreasonably delayed or unlawfully withheld" a required agency action.

9 It is not, however, determinative of that fact. Lead agencies are not required to specifically list in  
an EIS every appearance of every species known to inhabit an area.

1 magnitude presented here. Taken as a whole, Plaintiffs have not established a substantial  
2 likelihood of success on the merits of their claims that a Supplemental EIS is required in this  
3 situation. At best, they have established serious questions going to the merits of that claim.

4 **B. Likelihood of Irreparable Harm**

5 **1. Irreparability**

6 Plaintiffs assert that, in the absence of injunctive relief, they will be harmed through  
7 diminished opportunities to look, enjoy, and study wildlife, and will suffer emotional and aesthetic  
8 injury from seeing the swallows subjected to stress and harm. Motion, at 19:2. This sort of injury  
9 is irreparable. See Cottrell, 632 F.3d at 1135 (“environmental injury, by its very nature, can  
10 seldom be adequately remedied by money damages”); see also Sierra Club v. Bosworth, Case No.  
11 05-civ-00397-CRB, 2005 WL 3096149, at \*11 (N.D. Cal. Nov. 14, 2005) (“environmental  
12 damage cannot be undone, whereas economic injury can almost always be rectified”). For very  
13 good reasons, courts including this one recognize a special solicitude for harms to the  
14 environment, and the attendant injury those harms inflict on people who care for it. The question  
15 presented in this motion is not whether the type of injury Plaintiffs have alleged is sufficiently  
16 weighty in magnitude, but whether the court is in a position to determine that it is likely to occur  
17 in the future.

18 **2. Likelihood**

19 “Plaintiffs seeking preliminary relief . . . [must] demonstrate that irreparable injury is *likely*  
20 in the absence of an injunction.” Winter, 555 U.S. at 22 (emphasis in the original). “[A]  
21 preliminary injunction will not be issued simply to prevent the possibility of some remote future  
22 injury.” Id. The claim of harm that initiated this suit stems from the faulty netting that caused  
23 swallows to be trapped, injured and killed in March and April. Motion, at 18-7-19:1; Complaint,  
24 at ¶ 74. On the basis of evidence acknowledged by all parties, the Court has no trouble concluding  
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1 that this caused Plaintiffs significant harm in the past. But the evidence does not support the claim  
2 that these harms are sufficiently likely to continue occurring in the future to the degree necessary  
3 to invoke the extraordinary remedy of injunctive relief.

4 Defendants acknowledge that significant swallow deaths occurred at the Bridges in March  
5 and April of this year. But since that time, Caltrans and its contractor performed significant  
6 repairs on the netting, and are undergoing continuing maintenance and monitoring. They report  
7 that these efforts have at least dramatically decreased, and may have eliminated, the rate of  
8 swallow mortality. After recording 65 swallow mortalities at the Bridges in March and April,  
9 Caltrans has conducted daily counts and has not recorded a single swallow mortality in the netting  
10 since April 28. Between that date and the date of the hearing on this motion, Caltrans has  
11 recorded only a single bird mortality at the Bridges (a house finch). Plaintiffs, who have been  
12 monitoring the Bridges closely and filed numerous declarations of their observations there, have  
13 also reported no swallow mortalities in that time.

14 In their Reply, Plaintiffs cite only a single piece of evidence that faulty netting continues to  
15 pose a danger of trapping swallows after the repairs. One of Plaintiff's experts, after visiting the  
16 Bridges, reported that "there are areas where the netting is billowing and flapping in the air,  
17 risking continued trapping, entanglement, and death," and observed and photographed a "dangling  
18 net . . . immediately next to over fifteen active nests," which in the expert's opinion poses "grave  
19 risks to the swallows." Supplemental Declaration of Lisa Hug, ECF No. 48-3, ¶ 6.<sup>10</sup> This  
20 testimony provides reason for continuing vigilance. But even a very thorough effort to repair and  
21 maintain netting cannot be expected to achieve perfection. The Court has carefully reviewed all of  
22 Plaintiffs' other evidence on this point. See, e.g., Hug Decl., at ¶¶ 9, 18; Declaration of Charles R.

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27 <sup>10</sup> At oral argument, Plaintiffs' counsel identified this as the most compelling piece of evidence  
28 that improperly installed netting continues to pose a threat of trapping and killing swallows.

1 Brown, Ph.D, ECF No. 17-3, at ¶ 17. It does not establish a likelihood of significant future harm  
2 in the face of the uncontradicted numbers showing that swallow mortality appears to have ceased.  
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4 Based primarily on the declarations of two ornithological experts, one who has visited the  
5 Bridges and another who has not, Plaintiffs also argue that additional hazards besides faulty  
6 netting are likely to cause future harm. They argue that netting poses a threat to birds for reasons  
7 of other than trapping – for example, by excluding swallows so that they then must nest in less-  
8 than-ideal locations. Hug Decl., at ¶ 19.<sup>11</sup> Combined with the effects of the construction itself,  
9 Plaintiffs argue that these harms are likely to cause the Colony to abandon the site. Hug Decl., at  
10 ¶ 16; Supplemental Declaration of Dr. Charles R. Brown (“Brown Suppl. Decl.”), at ¶¶ 5-6.

11 The Court cannot determine that Plaintiffs will suffer harm from the maintenance of  
12 properly installed, well-maintained netting without attempting to adjudicate a battle of experts.  
13 Marie Strassburger, the regional chief in FWS’s Division of Migratory Birds and Habitats states  
14 that it is her division’s opinion “that the netting is appropriate and should remain in place if  
15 construction activities continue,” because removing the netting will harm nesting birds.  
16 Declaration of Marie Strassburger, at ¶¶ 8-9. A leading expert on cliff swallow nesting deterrence,  
17 whose work has been cited by both parties, recognizes that “[t]he generally accepted method to  
18 prevent cliff swallows from nesting is exclusion by netting,” and that while alternative approaches  
19 have been studied, they are not proven to be completely effective and ”do not fully solve the  
20 problem faced by departments of transportation.” Conklin et al., Deterring cliff-swallow nesting  
21 on highway structures using bioacoustics and surface modifications, *Human-Wildlife Conflicts*  
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24 <sup>11</sup> This harm could not be remedied by attempting other methods to deter swallows from nesting  
25 on the Bridges. It could only be remedied by refraining from doing any construction at the  
26 Bridges during the swallows’ nesting season from April to August. This would only leave one  
27 month of each year in which Caltrans could perform in-water work on the bridge, since Caltrans’  
28 permit from CDFW only permits in-water work at the Petaluma Bridge between July 1 to  
September 30 in order to protect the threatened California Longfin Smelt. See Blunk Decl., at ¶ 10.

1 3(1); 93-102, Spring 2009, ECF No. 17-18; Declaration of Michael J. Delwiche, ECF No. 41, at ¶¶  
2 8-10.

3 Plaintiffs also contend that construction activities themselves are injurious to the Colony.  
4 Reply, at 17:11-14. But the FEIS disclosed specifically that heavy construction activity would  
5 occur at the Bridges, and after engaging with the public and consulting the relevant experts in the  
6 federal and state governments, the lead agencies determined that construction would not cause  
7 significant impacts to nesting birds provided that appropriate mitigation take place. The Court  
8 cannot conclude otherwise without taking the opinion of one expert over another.  
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10 In addition, to find irreparable harm, a court must find not just that a plaintiff will  
11 suffer, but that they “will suffer an irreparable loss of legal rights.” Sierra On-Line, Inc. v.  
12 Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984). The FEIS is presumed valid, and the  
13 actions agencies take pursuant to the ROD are authorized by law. Defendants’ only arguably  
14 viable claim is that Defendants must consider whether new information requires preparation of a  
15 Supplemental EIS. Only if, as a result of that inquiry, the agencies determine that a Supplemental  
16 EIS is necessary will the harms Plaintiffs suffer from construction be the type protected by law.  
17

18 **3. Heightened Standard for Mandatory Injunctions**

19 Even assuming that Plaintiffs could show that repaired netting is likely to cause them  
20 significant future harm, this harm would not be remedied by the first prong of Plaintiffs’ request  
21 for injunctive relief (that construction work cease at the Bridges). To remedy the harm allegedly  
22 caused by the netting, the Court would also need to grant the second prong of Plaintiffs’ proposed  
23 injunction: that Defendants take proactive steps to remove the netting from the Bridges.  
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25 The Ninth Circuit, amongst other circuits, adopts a “heightened standard with respect to  
26 mandatory injunctions.” Park Vill. Apartment Tenants Ass’n v. Mortimer Howard Trust, 636 F.3d  
27 1150, 1161 (9th Cir. 2011) cert. denied, 132 S. Ct. 756 (U.S. 2011). To be granted a mandatory  
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1 injunction, Plaintiffs must show that “extreme or very serious damage will result” to their claimed  
2 interests. Id., 636 F.3d at 1160.

3 According to Dougherty, installing the nets took 10 days, and removing them would take  
4 1-2 weeks. Blunk Decl., at ¶¶ 11, 21. To remove the netting would require night work in moving  
5 traffic, and workers would be suspended in a basket over the edge of the bridge 75 feet above the  
6 water at the Petaluma site and up to 25 feet above ground at the Lakeview site. If Plaintiffs do not  
7 succeed on their claims, all of this work would need to be done, and then repeated again to  
8 reinstall the netting.

9 As a demand that Defendants take a proactive action, as opposed to refrain from taking  
10 further action, the second prong of Plaintiff’s proposed injunction certainly appears to be a  
11 “mandatory” injunction. Plaintiffs contend otherwise, citing Dep’t of Recreation for State of  
12 Calif. v. Bazaar Del Mundo, Inc., 448 F.3d 1118, 1124 (9th Cir. 2006)’s statement that the “*status*  
13 *quo* is not simply any situation before the filing of the lawsuit, but rather the last uncontested  
14 status that preceded the parties’ controversy.” Plaintiffs characterize the *status quo ante litem* as  
15 the status before Defendants installed the netting, and therefore they argue that it would not be a  
16 “mandatory injunction” to restore that state of affairs.

17 Bazaar Del Mundo cites the definition of the *status quo litem*, but does not discuss what  
18 constitutes a “mandatory injunction.” In the case Bazaar Del Mundo cites for that definition,  
19 GoTo.Com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1210 (9th Cir. 2000), the Ninth Circuit found  
20 that an injunction that enjoined defendants from using an allegedly protected trademark was,  
21 unsurprisingly, not a mandatory injunction. See GoTo.Com, Inc. v. Walt Disney Co., Case No.  
22 Civ-99-1674 TJH (RC), 1999 WL 1043278, at \*1 (C.D. Cal. Nov. 12, 1999) aff’d sub nom.  
23 GoTo.com, Inc., 202 F.3d at 1199 (9th Cir. 2000).

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26 In Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir.  
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1 2009), the Ninth Circuit discussed the distinction in detail, and reaffirmed the standard from  
2 Bazaar del Mundo. In Marlyn, a defendant had distributed and sold a product that infringed a  
3 plaintiff's trademark. The district court "ordered that [the defendant] recall its product and give  
4 restitution to customers who had bought its product." 571 F.3d at 879. On Plaintiffs' view, this  
5 would not seem to be a mandatory injunction, since the court's order merely restored the last  
6 uncontested status before the defendant began selling the trademarked product. But the Ninth  
7 Circuit did not see it that way, holding that the "[r]emedy went beyond the *status quo* pending  
8 litigation and instead required [a defendant] to take the affirmative step of recalling its product."  
9 Id. "Thus, the recall order at issue did not operate simply to preserve the *status quo*, or to restrain  
10 [defendant] from further acts of possible infringement, because it involved products no longer  
11 within [defendant's] possession." Id.

12 Plaintiffs' second request for injunctive relief is much more comparable to a mandatory  
13 injunction than a prohibitory one. The gravamen of Plaintiffs' complaint reveals that the parties'  
14 dispute began when faulty netting began killing large numbers of birds. Complaint, at ¶¶ 71-92.  
15 While the Court understands that Plaintiffs also seek to challenge the maintenance of the nets  
16 themselves, it is not necessary that the Court order that act undone "to preserve the power of the  
17 court to render a meaningful decision." Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2948 (2d  
18 ed.) Nor is this a situation in which "a defendant with notice in an injunction proceeding  
19 completes the acts sought to be enjoined the court." Porter v. Lee, 328 U.S. 246, 251 (1946).  
20 Defendants proceeded to restore the nets before they had any notice of this suit.  
21

22 Plaintiffs are "seeking affirmative relief through a Rule 65(a) order to prevent some future  
23 injury." Wright & Miller, § 2948. "[T]his fact alone should not bar relief." Id. But since  
24 Plaintiffs want this Court to "require[] affirmative conduct," their request "is subject to heightened  
25 scrutiny and should not be issued unless the facts and law clearly favor the moving party." Dahl  
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v. HEM Pharmaceuticals Corp., 7 F.3d 1399, 1403 (9th Cir. 1993). The question of whether properly installed netting will harm the birds is vigorously contested, and the evidence that such netting will trap and kill birds in significant numbers is essentially speculative. Therefore, the Court cannot conclude that Plaintiffs have demonstrated that they are likely to suffer the sort of “extreme or very serious damage” that permits the Court to order Defendants to begin taking affirmative conduct pending litigation on the merits.

#### 4. “Procedural” Injury

Finally, Plaintiffs also assert, quoting Baykeeper v. U.S. Army Corps of Engineers, Case No. Civ. S-06-1908 FCD/GGH, 2006 WL 2711547, at \*15 (E.D. Cal. Sept. 20, 2006), that “the procedural injury caused by the [agency’s] unlawful failure to prepare an EIS constitutes irreparable harm.” The Court does not agree with Federal Defendants that this assertion has necessarily been weakened by Summers v. Earth Island Inst.’s holding that “deprivation of a procedural right without some concrete interest that is affected by the deprivation - a procedural right *in vacuo* - is insufficient to create Article III standing.” 555 U.S. 488, 496 (2009). Summers’ rule defines the type of injury-in-fact necessary to establish standing, not the type of irreparable harm necessary to obtain injunctive relief.

But in Baykeeper, the court rested its conclusion of irreparable harm not solely on an alleged “procedural” injury but also on demonstrated risks to endangered and threatened species. 2006 WL 2711547, at \*15-16. If Plaintiffs assert that a “procedural” injury suffices to grant plaintiffs irreparable harm even in the absence of a threat to a species, it would seem that anyone challenging an agency’s failure to prepare an EIS or a Supplemental EIS (or, indeed, to take any action allegedly required by NEPA) would automatically satisfy one fourth of the requirements for achieving a preliminary injunction. It is doubtful that this is the rule of this circuit. In recognizing the concept of a “procedural” injury, Baykeeper cited two Ninth Circuit cases. In the first case,

Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 737, n. 18 (9th Cir. 2001), the pertinent holding appeared in a footnote, and the opinion's overall approach to injunctive relief was abrogated by Monsanto Co. v. Geertson Seed Farms, --- U.S. ---, 130 S. Ct. 2743, 2757 (2010). In the second case, Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1124 (9th Cir. 2005), the Ninth Circuit actually said that is “doubtless” accurate to observe that “there is no presumption of irreparable harm in procedural violations of environmental statutes.”

Even if Plaintiffs were “automatically” able to establish irreparable harm for asserting a NEPA violation, as discussed immediately *infra*, the tenuousness of Plaintiffs’ claims of non-procedural future harm substantially undermine Plaintiffs’ arguments on the third and fourth factors of the preliminary injunction analysis.

### C. Balancing of the Equities and the Public Interest

“The third and fourth factors, harm to the opposing party and the public interest, merge when the Government is the opposing party.” Nken v. Holder, 556 U.S. 418, 420 (2009). “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). “A court of equity may tailor its relief with a critical and balanced view of the ramifications of its decision, including in the overall public interest a consideration of the interests of those not before the court.” Blair v. Freeman, 370 F.2d 229, 239 (D.C. Cir. 1966).

Since Plaintiffs have not demonstrated a substantial likelihood of success, but at best have demonstrated serious questions going to the merits, injunctive relief is only permissible if the balance of equities tips “sharply” in Plaintiffs’ favor. See Cottrell, 632 F.3d at 1135.

On their side of the equities, Plaintiffs assert the harms discussed *supra*: diminished opportunities to enjoy wildlife, and emotional and aesthetic injury from seeing swallows subjected

1 to stress and harm. These are serious considerations, worthy of serious weight. In addition, the  
2 public policy of environmental disclosure contained within NEPA weighs in favor of injunctive  
3 relief.

4 Against these considerations, the Court must weigh the harm to the public of delaying for  
5 at least a year an important transportation infrastructure project with significant direct and  
6 collateral economic benefits. Unlike Bair v. Calif. Dept. of Transp., Case No. 10-Civ-04360  
7 WHA, 2011 WL 2650896, at \*8 (N.D. Cal. July 6, 2011), the case on which Plaintiffs  
8 substantially rely, construction is not six months off. Construction has been underway since  
9 December 2012, and an important phase of in-water work is due to begin in days. Blunk Decl., at  
10 ¶ 5. The timeline for litigation on the merits will not permit this construction to occur this year  
11 because, pursuant to its permit from CDFW, Caltrans must conduct its in-water work within a 90-  
12 day window that is necessary to avoid potential harm to the California Longfin Smelt, a California  
13 protected species. Finney Decl., at ¶ 18; Blunk Decl., at ¶ 10. This is not a case in which wildlife  
14 interests fall entirely on one side of the ledger.

15 Numerous citizens have interests that will be harmed by delaying the Project for a year,  
16 including the taxpayers of Sonoma County who supported a sales tax increase to fund its  
17 completion. While Plaintiffs' expert disputes the estimates of Caltrans officials, it is not  
18 unreasonable to estimate that delaying a year would cost state and local governments millions of  
19 dollars, as well as cost many workers their jobs. Compare Finney Decl., at ¶¶ 20-22 with  
20 Declaration of William M. Lider, B. Sc. Eng., ECF No. 48-1, at ¶¶ 16-17. And the costs are not  
21 purely economic, since an injunction would forestall for a year the public safety and transportation  
22 efficiency goals of the Project.<sup>12</sup>

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27 <sup>12</sup> In Idaho Sporting Cong. v. Rittenhouse, 305 F.3d at 974 (9th Cir. 2002), the Ninth Circuit  
28 enjoined the U.S. Forest Service from proceeding with certain timber sales until it performed

1 All of these substantial public harms might well be worth bearing to avert a likely and  
2 significant threat to the environment, especially to a threatened or protected species or to a  
3 sensitive natural community.<sup>13</sup> But for the reasons just discussed, this is not a case in which the  
4 Court can conclude that these harms are demonstrably likely to occur. The balance of equities  
5 does not tip, much less tip sharply, in Plaintiffs' favor.

6 The Court takes seriously the concerns and interests of those who enjoy wildlife, and it  
7 takes seriously its obligation to ensure that the federal laws that protect the environment are fully  
8 effectuated. But under the law, a preliminary injunction is reserved for extraordinary cases in  
9 which demonstrably likely future harms can only be averted by the extraordinary remedy of  
10 injunctive relief. This is not such a case.

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20 analysis required under the Forest Act and NEPA. In addressing the defendant's harm in a  
21 preliminary injunction analysis, the court found that “[b]ecause we ask only that the Forest Service  
22 conduct the type of analysis that it is required to conduct by law, an analysis it should have done  
23 in the first instance, it is difficult to ascertain how the Forest Service can suffer prejudice by  
24 having to do so now.” *Id. (quoting Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d  
25 1372, 1382 (9th Cir. 1998)). While that logic is appealing, here it is not just the harms to an  
26 agency as an entity that are at issue. It is the harms to the public that will accrue from  
27 significantly delaying infrastructure investments that affect an entire region.

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29 <sup>13</sup> Harm to any species impacts people who care for wildlife and also has often undetectable  
30 influence on the delicate ecosystem in which we live. But in balancing public interests, it is  
31 appropriate to note that while the cliff swallow is protected under the MBTA, it is a common and  
32 well-distributed species that has not been listed as threatened or endangered by either the federal  
33 or state governments.

1           **IV. CONCLUSION**

2           Plaintiffs have not carried their burden of demonstrating that a preliminary injunction is  
3           permissible. The motion is DENIED.

4           **IT IS SO ORDERED.**

5           Dated: July 2, 2013

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7           JON S. TIGAR  
8           United States District Judge